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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: CERCLA Funding of State Oversight of Potentially Responsible Parties (PRPs)

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I-X

RECEIVED
JAN 21 1986
US EPA
SOLID WASTE AND EMERGENCY RESPONSE
HARRIS WASTEWATER TREATMENT PLANT

This memorandum sets forth the policy and procedure for providing funds to States to support certain enforcement-related activities in addition to State-conducted remedial investigations and feasibility studies. These activities are: (1) oversight of RI/FS and remedial designs prepared by potentially responsible parties at State-lead enforcement sites; and (2) management assistance for RI/FS and RD conducted by PRPs at EPA-lead enforcement sites.

In response to specific requests for such funding, we have drafted the attached guidance. This guidance explains the conditions to be met and tasks to be funded for the two activities mentioned above. However, State funding for work related to Federal facility sites (management assistance and oversight) will currently not be allowed. There are key issues to be resolved in defining EPA and State roles in remedial work conducted by Federal Agencies at Federal facility sites. As we resolve these issues, funding guidance may be developed in the future.

In a related matter, we are currently formulating additional guidance for funding States for other types of enforcement activities as well as those outlined in the attached guidance (e.g. oversight of PRP remedial construction, negotiation and litigation). When the specific conditions and tasks and funding levels are determined, this guidance will be expanded and issued as a draft addendum to the manual State Participation in the Superfund Remedial Program.

A draft of this guidance was distributed for comment to the Regions, State associations and Headquarters offices on July 15, 1985. A summary of the comments and our responses is attached for your review.

Due to the current "slowdown" of the CERCLA program, there is currently no money available in the enforcement budget to fund these oversight and management assistance activities. In the event CERCLA reauthorization occurs and monies are provided in the budget, there may be funds available later in the fiscal year. When monies become available, the concurrence of the CERCLA Enforcement Division Director in the Office of Waste Programs Enforcement must be obtained and the enforcement Superfund Comprehensive Accomplishments Plan formally amended.

Since funding of State enforcement activities is a new venture for the CERCLA program, Regional enforcement and program staff should work closely together on its implementation. I also encourage close coordination with your Regional Coordinator in the CERCLA Enforcement Division in OWPE and Hazardous Site Control Division in OERR. I would like drafts of new cooperative agreements or amendments submitted for review to the appropriate Regional Coordinator in the Compliance Branch in CED. This review is necessary to ensure that implementation of these new funding activities is nationally consistent, and that distribution of monies available in the future is made in an equitable manner.

If you have any questions on the guidance, you may contact Tony Diecidue, Office of Waste Programs Enforcement (WH-527), U.S. Environmental Protection Agency, 401 M. Street, S.W., Washington, D.C., or telephone him at Area Code 202/FTS 382-4841.

Attachments

cc: Directors, Waste Management Divisions, Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Region III
Directors, Air and Waste Management Division, Regions II, VI
Director, Toxics & Waste Management Division, Region IX
Director, Hazardous Waste Division, Region X

CERCLA FUNDING OF STATE OVERSIGHT OF POTENTIALLY RESPONSIBLE PARTIES (PRPs)

PURPOSE

The purpose of this guidance is to assist EPA Regional offices on funding, under a CERCLA cooperative agreement (CA), of State oversight of Potentially Responsible Parties (PRP) conducting Remedial Investigations (RI), Feasibility Studies (FS), and Remedial Designs (RD) at sites on the National Priorities List (NPL). The guidance also discusses funding of States during a Federal enforcement response. This is interim final guidance and Regional staff should contact their appropriate Headquarters counterpart if questions or problems arise when proceeding to award a CA for PRP oversight.

BACKGROUND

EPA's Office of General Counsel has concluded that CERCLA funding may be provided to States to support various enforcement related activities in addition to State conducted RI/FS at State-lead enforcement sites.* The rationale is that such activities are part of the remedial planning process (CERCLA, Section 104(b)) and consequently are eligible for CERCLA funding. Subsequent to this opinion, several policy statements have reflected the allowability of such funding.** Furthermore, several States have indicated their interest in conducting oversight activities.

The role of States in oversight of PRP conducted RI/FS and/or RD depends on whether the State or EPA negotiated the administrative order. If the State negotiated the administrative order, then the State has the lead for oversight of the PRP's work. If EPA negotiated the administrative order, then EPA is responsible and generally has the lead for oversight. However, when EPA has the lead for oversight the State may receive funding for management assistance and, under certain circumstances, may undertake a portion of the oversight with EPA approval.

GUIDANCE

This guidance is divided into two sections:

- State oversight of PRPs; and
- EPA oversight of PRPs.

*L.A. DeHihns, Authority to Use CERCLA to Provide Enforcement Funding Assistance to States, July 20, 1984.

**L.M. Thomas and D.A. Lazarchik, EPA/State Relationship in Enforcement Actions for Sites on the National Priorities List, October 2, 1984; G.A. Lucero, Funding of State Enforcement-Related Activities, January 23, 1985.

Each section explains the conditions for awarding funds and the fundable tasks for each situation. This guidance, however, does not preclude the Regions from including additional conditions in the application if warranted.

1. Funding State Oversight of PRPs - State Enforcement Response

If a State successfully negotiates to have the PRPs conduct the RI/FS and/or RD, it will be in the State's interest to oversee the PRPs' work. As a general rule, States should attempt to secure funds for this oversight in advance from the PRPs as part of the settlement. Where this is not possible, EPA may fund the State for oversight and will seek future CERCLA \$107 cost recovery for those costs.

A.1 Conditions for Funding under a Cooperative Agreement: Oversight of RI/FS

In order to receive funding from EPA for oversight of a PRP conducted RI/FS, the State must include the following information and assurances in their cooperative agreement application:

1. The State must issue or obtain an enforceable order, decree or equivalent requiring the PRP to prepare a RI/FS in accordance with the National Contingency Plan (NCP) and applicable EPA guidance. A copy of the order must be included in the cooperative agreement application.
2. The State's Attorney General must provide a letter outlining the State enforcement authorities that will be used in the event an enforcement action must take place against the PRPs. (The letter may be used for all subsequent oversight funding requests as long as no changes in State law have occurred.)
3. The State must submit with the CA application a letter from the Governor, Attorney General or designee certifying that:
 - The State believes a good enforcement case exists against the PRPs (i.e. financially able to undertake the remedy or expected cost of the remedy) at the onset of the RI/FS.
 - If a good enforcement case continues to exist at the completion of the RI/FS, the State agrees to pursue administrative or civil enforcement action to (1) assure performance of the RD/RA by the PRP or (2) collect from the PRP the funds necessary to conduct the RD/RA.
 - The State will select a remedy that is consistent with the NCP.

- The State attempted to secure funds for oversight of the RI/FS from the PRP but was either unsuccessful or lacked authority under State law.

If State law directly gives these authorities to a State agency, a letter to this effect will be appropriate.*

4. The State must agree to submit all final plans, reports, specifications, and/or recommendations to EPA for review and concurrence prior to issuance or implementation. Final PRP documents or plans and PRP change orders that substantially change the scope of work must be submitted to EPA prior to issuance for review to ensure technical adequacy and compliance with the terms of the CA. The State must also assure in the CA that it will not expend funds for oversight of the RI field activities until EPA has had the opportunity to review and comment on the RI work plan and has indicated in writing that this condition was satisfied. EPA will agree to provide their review within the timeframes or schedules established in the order.

- 5. The State must prepare and implement a community relations plan in accordance with applicable EPA guidance. The plan must include a provision for public comment on the RI/FS.

A.2 Conditions for Funding under a Cooperative Agreement:
Oversight of RD

In order to receive funding from EPA for oversight of a PRP conducted RD, the State must include the following information and assurances in its CA application:

1. The State must issue or obtain an enforceable order, decree or equivalent requiring the PRP to prepare a RD in accordance with applicable EPA guidance. A copy of the order must be included in the CA.
2. The State's Attorney General must provide a letter outlining the State enforcement authorities that will be used in the event an enforcement action must take place against the PRPs. (The letter may be used for all subsequent oversight funding requests as long as no changes in State law have occurred.)
3. The State must submit with the CA application its documentation similar to EPA's Record of Decision (ROD) or Enforcement Decision Document (EDD), outlining the information and rationale used to select a remedy consistent with the NCP.

*Since the State cannot recover any CERCLA funds that EPA has provided for work at the site, the enforcement and cost recovery provisions in Appendix F of the manual, State Participation in the Superfund Remedial Program, still apply.

4. The State's Governor, Attorney General or designee must certify in the CA application that the State attempted to secure funds for oversight of the RD from the PRP but was unsuccessful.
5. The State must agree to submit all final plans, reports, specifications, and/or recommendations to EPA for review and concurrence prior to issuance or implementation. Final PRP documents or plans and PRP change orders that substantially change the scope of work shall be submitted to EPA prior to issuance for review to ensure technical adequacy and compliance with the terms of the CA. The State may not expend funds for oversight of the RD activities until EPA has had the opportunity to review and comment on the RD work plan and has indicated in writing that this condition was satisfied. EPA will agree to provide their review within the timeframes or schedules established in the order.
6. The State must prepare and implement a community relations plan in accordance with applicable EPA guidance.

The Regional Administrator will review the rationale used to select the remedy, the enforceable order and the CA application. Based on this review, the Regional Administrator may decide to:

- Fund oversight of the RD (all or some of the tasks in the application);
- Not fund oversight of the RD if the State/PRP negotiated remedy is unacceptable to EPA; or
- Initiate EPA enforcement actions against the PRP.

In order to avoid delays and problems during EPA's review, States should work with the EPA Regional Office and keep EPA informed throughout the remedial planning process, remedy selection process and negotiations with the PRPs.

B.1 Fundable Oversight Tasks: RI/FS

Currently, EPA does not have experience with funding States to oversee PRPs conducting remedial response tasks. In an effort to provide States and Regions with some guidelines on costs and allowable tasks, we reviewed the Federal experience with oversight. We also reviewed typical State costs for certain specific tasks. Based on these reviews, we have determined that State costs for oversight generally should range between 8% to 10% of the cost of the RI/FS. The rationale is that the PRPs are responsible for actually managing the work and conducting the RI/FS. States should not be duplicating work conducted by the PRPs. Therefore, in most situations, funding within this range should be adequate for oversight. Since this is a new activity, however, the Regions are encouraged to review carefully the budgets submitted by States and to consult with their Headquarters counterpart in OWPE before awarding CAs for oversight.

In preparing and reviewing the proposed budget, it might be helpful for States and Regions to think of oversight as consisting of review tasks, community relations, and field related tasks. States should try to specify in the administrative order the roles and responsibilities of the PRP as distinguished from the roles and responsibilities of the State in each of these major categories.

Review tasks conducted by the State might include:

- Review preliminary planning documents;
- Review and comment on scope of work and work plans;
- Review and comment on quality assurance project plans and site safety plans;
- Review and comment on draft RI reports;
- Review final RI reports;
- Review and discuss FS objectives;
- Review and comment on draft FS;
- Review final FS;
- Review PRP monthly progress reports;
- Organize and participate in technical meetings on the RI/FS with the PRPs, PRP contractors, and/or EPA.

Since the tasks listed above are similar to those described under Management Assistance in Chapter IV (page IV-6) of the manual State Participation in the Superfund Remedial Program, it may be helpful to consult that section for more information.

States must oversee and manage the development and implementation of community relations tasks. For additional guidance States should consult Appendix K, "Community Relations Plan Format and Sample Plan", of the manual State Participation in the Superfund Remedial Program and the document Community Relations in Superfund: A Handbook, especially Chapter 6 which deals with community relations during enforcement actions.

Community relations tasks listed in the Appendix include:

- Conduct discussions with the affected community in the locale of the site;
- Prepare community relations plans;

- Hold public comment period on the RI/FS;
- Brief local and State officials;
- Hold public meetings on technical aspects of the site;
- Prepare fact sheets and press releases and disseminate information;
- Prepare summaries of public concerns.

In some instances it may be appropriate, at the sole discretion of the State, for responsible parties to participate in aspects of the community relations plan jointly with the State.

Finally, during oversight, States probably will want to conduct some tasks directly related to work in the field.

Field related tasks conducted by the State might include:

- Preparing or assisting the PRP to prepare detailed work plans;
- Environmental monitoring (e.g. air, water);
- Analyzing split samples;
- On-site presence*/inspection.

B.2 Fundable Oversight Tasks: RD

After reviewing our experience with RDs, we have determined that State costs for oversight generally should not exceed 4% to 6% of the cost of the RD. The rationale is that the PRPs are responsible for managing the work and conducting the RD. The State's oversight of PRP conducted RD primarily will involve review tasks and community relations. The tasks may include but are not limited to:

- Participate in technical design briefings for RD initiation;
- Review design scopes of work;
- Technical meetings on the RD with the PRPs, PRP contractors and/or EPA;

*The amount of on-site presence to be funded by EPA during oversight of a PRP RI should be negotiated with EPA on a case-by-case basis. The amount of on-site presence needed varies widely according to the type and condition of the site, the distance of the site from the State offices, and other considerations.

- Prepare fact sheets and notify public on RD activities and what the RD is expected to entail;
 - Continue prior community relations activities as needed;
 - Assist in reviewing preliminary design documents and design changes which may affect remedy selection;
 - Review and comment on value engineering screening submittals;
 - Review and comment on quality assurance project plans, site safety plans and intermediate design documents;
 - Review and comment on plans for operation and maintenance developed by PRP;
 - Review final RD.
2. Funding State Management Assistance and Oversight of PRPs - Federal Enforcement Response

If EPA has negotiated the administrative order with the PRPs, EPA will have the lead for the oversight of PRP activities and for community relations. In this situation, States may receive funding for management assistance. Management assistance will essentially involve review tasks and is explained in detail in Chapter IV, page IV-6, of the EPA manual State Participation in the Superfund Remedial Program.

In some cases, the State and EPA Regional Office may agree that the State as well as EPA or EPA's contractor should have an oversight role during a Federal enforcement response. This means the State would be conducting some community relations tasks and/or some field related oversight tasks as described in the oversight section above. For each task, the CA should clearly explain the roles and responsibilities of the State as distinguished from the roles and responsibilities of EPA or EPA's contractor. It should be made clear, however, that the State cannot act as EPA's agent to the PRPs. Where EPA has the lead for oversight, EPA encourages the State to conduct oversight tasks only if the State has the inhouse capability to do the work. Generally, EPA will fund the State to hire a contractor for these tasks only if the State can show that it is cost-effective to do so. Furthermore, EPA will not pay States for conducting tasks that duplicate EPA's oversight efforts.

SUMMARY OF COMMENTS AND RESPONSES ON THE GUIDANCE

CERCLA FUNDING OF STATE OVERSIGHT OF POTENTIALLY RESPONSIBLE PARTIES (PRPs)

- One commentor asked for flexibility in decision-making on whether to have further PRP involvement during RD/RA or switch to a Fund-financed RD/RA. In response, we have added appropriate language to the guidance.
- One commentor suggested that enforcement action referenced in the background section is not limited to administrative orders. We agree that States may want to use judicial action to compel PRPs to perform the RI/FS. We are currently formulating guidance for these activities and will expand the background section when this additional guidance is issued.
- ✓ • One commentor recommended that States not select a remedy, but provide the proposed remedy to EPA for review and approval. Neither the National Contingency Plan or State Participation Manual require that EPA select the remedy if EPA funds the RI/FS. This is only a condition for funding the RA. However, we agree that more specific language is needed to ensure that conditions of the agreement are met. EPA involvement in reviewing key RI/FS work products is needed to (1) decide whether to be co-signers to administrative orders, consent decrees or other State enforcement actions and (2) be in the most informed position possible when determining whether to delist the site from the NPL. Therefore, the need to be informed and involved is not just a condition for funding but to ensure consistent and effective remedies at NPL sites on a national basis. In light of this, we have revised language in the guidance.
- One commentor recommended more stringent assurances that the State make any changes requested by EPA to the RI work plan and may have their funding withdrawn if EPA is not satisfied with the plan or the oversight of its implementation. We feel the current language in the guidance is sufficient to ensure EPA's review of the work plan and that funds will not be expended for oversight of field activities until this condition is satisfied.
- One commentor recommended that when requesting RD oversight funds, a State should submit to EPA a remedy consistent with the NCP and provide support documentation. In response, we have made the appropriate changes to the guidance.

- Two commentors suggested that it may be difficult to estimate the cost of the RI/FS or RD since the PRP may not necessarily provide this information to the State. Therefore, it was recommended that a fixed amount be established. We believe there is enough experience available for the State to come up with a reasonable estimate, and we should not establish a fixed amount. The Region should also use their experience and work with the State in developing proper funding amounts.
- One commentor requested a more specific reference to the enforcement chapter of the Community Relations Handbook. In response, we have made this reference in the guidance.
- One commentor recommended that the State be required to submit a Site Management Plan (SMP) and EPA/State Enforcement Agreement (ESEA) with the cooperative agreement (CA) application. We feel this requirement goes beyond the scope of the funding guidance. The role of ESEAs (i.e. in what situations should they be prepared and whether they should be prepared if there is a CA covering the same activities) has yet to be worked out within the CERCLA enforcement program. Furthermore, schedules and commitments outlined in SMPs and ESEAs may duplicate those outlined in cooperative agreements and RI/FS work plans.
- One commentor asked how CAs are to be interrelated with ESEAs. CAs are mechanisms for passing monies to a State to conduct certain allowable activities at NPL sites. ESEAs are documents outlining the roles and responsibilities between the two parties during an enforcement action at NPL sites. ESEAs are not necessarily required if a CA for a site has been awarded. The Office of Waste Programs Enforcement is currently reviewing the applicability of ESEAs and will be drafting guidance on this matter.
- One commentor requested that the State be allowed to conduct an RI/FS "or equivalent," thereby making the funding guidance consistent with the October 2, 1984 policy on "EPA/State Relationship in Enforcement Actions for Sites on the NPL." We feel that since Federal funding is being provided, the State should be consistent with what the Federal government would perform in lieu of the State. Therefore, an RI/FS should be prepared when CERCLA funds are provided to a State.

- One commentor asked why the State should commit to pursuing enforcement actions, while the October 2, 1984 policy requires that the State only "pursue and ensure implementation of a remedy." Again, we feel that this requirement is consistent with what EPA would do under Federal-lead enforcement in the event PRPs decided not to perform the RD/RA. The commitment to pursue further enforcement action is an important factor in whether to fund State oversight of PRPs.
- One commentor asked whether a State could use the CERCLA Technical Enforcement Support (TES) contracts. We will not allow use of the TES contracts for any tasks funded under the CA.
- One commentor asked which Regional staff, enforcement or remedial, has the lead for monitoring CAs for State oversight of PRPs. This responsibility lies with the Regional enforcement staff.
- Two commentors asked how EPA would quality assure or assess the State's implementation of PRP oversight under CAs. This issue is being addressed as part of the CERCLA enforcement program's development of a PRP oversight manual.
- One commentor recommended that State oversight of RI/FS be funded at a higher percentage (10 to 20 percent) than allowed in the guidance, while also providing flexibility to allow even more on a site-by-site basis. We feel that oversight costs will not be this high except in rare instances. Also, a State's oversight may not be as costly as for the Federal government and we may not have sufficient funds to even entertain this level of funding. Therefore, we will keep the percentage at 8 to 10 percent.
- Two commentors supported early resolution of the Federal facilities issue, so that funding for Federal facilities oversight could be provided to the States. One of the commentors also recommended that a pilot project be awarded, in order to gain useful information for future guidance on the issue. We are sensitive to the commentors' concerns that the Federal facilities issue be resolved in a timely manner. However, until that time it is not appropriate to fund States for this activity.

- One commentator recommended that EPA give advance notice of this guidance to the States, and be flexible on whether the State must meet all the conditions outlined in the guidance for ongoing site actions. We feel that the only condition suitable for waiver is the requirement that a State certify it attempted to secure oversight funds from the PRPs. This requirement will be waived for ongoing projects in which settlements have already been reached with PRPs prior to the date of this interim final guidance. However, the other principles and conditions outlined in the guidance still apply.
- One commentator suggested that the requirement for public comment on consent orders is not mandatory and should be deleted from the guidance. Please refer to OWPE's August 28, 1985 memorandum entitled "Community Relations Activities at Superfund Enforcement Sites," which outlines when public comment on administrative orders is appropriate.
- One commentator suggested that the level of detail required for documenting the information and rationale used for selecting a remedy would pose an administrative burden on the State. We feel this information is essential to reviewing and determining whether to fund a State for oversight of the RD. We encourage the States to establish a consistent approach to developing adequate documentation. This will enable EPA to provide timely review and approval of CAs for State oversight of RD.
- Two commentators recommended that an official other than the Governor or Attorney General be allowed to make the required certifications outlined in the guidance. In response, we have added language to the guidance.
- One commentator recommended that EPA agree to provide review and comment on the RI work plan in the timeframes established in the administrative order. In response, we have added language to the guidance.
- One commentator suggested that the State should be allowed the lead for oversight after an EPA-lead settlement has been reached with PRPs. Section (2) of the guidance does allow an oversight role for States at EPA-lead enforcement sites. The proper role should be determined by the Region and State on a site-by-site basis. However, the State cannot act as EPA's agent to the PRPs and will not be given the entire lead for the site.
- Two commentators asked whether funds for oversight of PRP construction will be provided to States. We are currently formulating guidance on funding this activity, and will issue an addendum to this guidance once the conditions and tasks and funding levels are determined.

- One commentor encouraged better coordination between the State's environmental office and Attorney General's office. The commentor recommended that the State Attorney General outline in writing what legal authorities are available to the State if enforcement action against the PRPs is necessary. We support and encourage this coordination, and have added a new condition to accomodate the recommendation.